

# UNITED STATES PATENT AND TRADEMARK OFFICE

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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/696,709	10/24/2000	Lewis H. Lambert JR.	11016US05/100-236.P2.C2	3310
759	90 11/29/2002			
Janet M McNicholas Esq McAndrews Held & Malloy Ltd 500 W Madison Street 34th Floor			EXAMINER	
			SNEDDEN, SHERIDAN	
Chicago, IL 60661			ART UNIT	PAPER NUMBER
			1653	
			DATE MAILED: 11/29/2002	1

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary    Examiner							
Examiner   Sheridan K Snedden   1653	•		Application No.	Applicant(s)			
Shendan K Snedden   1653	•		09/696,709	LAMBERT, LEWIS H.			
The MALLING DATE of this communication appears on the cover sheet with the correspondence address → Period for Repty  A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.  Learenous of term may be available under the provisors of 3 CFB 1.13(a). In no event, however, may a rapy be timely filed where the provisors of 3 CFB 1.13(a). In no event, however, may a rapy be timely filed where 30.00 for the provisor of the provisor of 3 CFB 1.13(a). In no event, however, may a rapy be timely filed and a state of the provisor of the pr			Examiner	Art Unit			
Period for Reply  A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.  after \$30.(8) MONTHS from the mailing date of this communication. If the period for reply specified above, the maintenant statutory practification or reply specified above, the maintenant statutory practification in the statutory maintenant of thing (26) days will be considered serely.  If NO period for reply a specified above, the maintenant statutory practification in the statutory maintenant or reply as specified above, the maintenant statutory practification in the communication of thing (26) days will be considered serely.  If NO period for reply a specified above, the maintenant statutory practification in the communication.  If NO period for reply a specified above, the maintenant statutory practification is not fined.  3   Status    1   Responsive to communication(s) filed on							
THE MAILING DATE OF THIS COMMUNICATION.  Extensions or the may be available under the povisions of 3 CFR 1.13(6). In no event, however, may a riply be timely filled after SX (6) MONTHS from the mailing date of this communication.  If the period to reply sending the communication of							
1) Responsive to communication(s) filed on  2a) This action is FINAL. 2b) This action is non-final.  3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under Ex parte Quayle, 1935 C.D. 11, 453 O.G. 213.  Disposition of Claims  4) Claim(s) 1-14 is/are pending in the application.  4a) Of the above claim(s) 5-8 and 12-14 is/are withdrawn from consideration.  5) Claim(s) is/are allowed.  6) Claim(s) is/are objected to.  8) Claim(s) is/are objected to.  8) Claim(s) are subject to restriction and/or election requirement.  Application Papers  9) The specification is objected to by the Examiner.  10) The drawing(s) filed on is/are: a) accepted or b) objected to by the Examiner.  Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  11) The proposed drawing correction filed on is: a) approved b) disapproved by the Examiner.  If approved, corrected drawings are required in reply to this Office action.  12) The oath or declaration is objected to by the Examiner.  Priority under 35 U.S.C. §§ 119 and 120  13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  a) All b) Some * c) None of:  1. Certified copies of the priority documents have been received.  2. Certified copies of the priority documents have been received in Application No  3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a).  * See the attached detailed Office action for a list of the certified copies not received.  14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  a) The translation of the foreign language provisional application has been received.  15) Acknowledgment is made of a claim for domestic priority under 35	A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.  - Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.  - If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.  - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.  - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).  - Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any						
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#### **DETAILED ACTION**

1. Applicant's election of invention I, claims 1-4 and 9-11 in Paper No. 6, filed October 3, 2002 is acknowledged. Claims 5-8 and 12-14 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention, there being no allowable generic or linking claim. Election was made **without** traverse as no arguments were presented. Claims 1-4 and 9-11 are considered in this Office Action.

#### Claim Rejections - 35 USC § 112

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 1, and dependent claims thereto, are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 1 is indefinite for the use of the abbreviation BPI, the full name of the protein should be recited in the claims.

### **Double Patenting**

3. A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

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A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer <u>cannot</u> overcome a double patenting rejection based upon 35 U.S.C. 101.

- 4. Claim 10 is rejected under 35 U.S.C. 101 as claiming the same invention as that of claim 4 of prior U.S. Patent No. 5,912,228. This is a double patenting rejection.
- 5. Claims 1-4 and 9-11 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-6 of U.S. Patent No. 5,912,228.

  Although the conflicting claims are not identical, they are not patentably distinct from each other because the products claimed are the same. The claims differ in that the claims of the instant application recite a therapeutic composition. However, a therapeutic composition is obvious as Patent 5,912,228 teach the composition for therapeutic use.

Claim 1 of Patent 5,912,228 teaches a composition comprising a BPI product, a polyoxypropylene-polyoxyethylene block copolymer selected to enhance antibacterial activity, and EDTA. Claim 1 and 9 of the instant application differs from this composition as it does not recite EDTA. However, Patent 5,912,228 teaches that EDTA is optional (see column 4, lines 10 and 11), and thus its omission would be obvious. Claim 2 and 10 of the instant application adds EDTA and thus teaches the composition of recited in claim 1 of Patent 5,912,228. Claims 3 and 11 of the instant application recite specific poloxamer surfactants and thus claims the product of

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claim 2 of Patent 5,912,228. Claim 4 of the instant application adds EDTA and thus teach the product of claim 3 of Patent 5,912,228.

## Advisory Information

- 6. No claims are allowed.
- 7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Sheridan K Snedden whose telephone number is (703) 305-4843. The examiner can normally be reached on Monday Friday, 8:30 AM to 5:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Christopher Low can be reached on (703) 308-2923. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 746-3975 for regular communications and (703) 746-3975 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0196.

SKS

November 22, 2002

KAREN COCHRANE CARLSON, PH.D PRIMARY EXAMINER

Your Cocham Carlson Pro)